JD–102–03
Anderson, IN

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERSTATE BRANDS CORPORATION

and Case 25-CA-28592

TEAMSTERS, LOCAL UNION No. 135, a/w
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Walter Steele, *Esq*., of Indianapolis, Indiana, for the General Counsel.
James R. Holland II, *Esq*. (*Bioff, Finucane, Coffey, Holland & Hosler, LLP*), of Kansas City, Missouri, for the Respondent.
Robin S. Greene, Business Representative, of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on June 9, 2003, based upon a charge filed on February 21, 2003, by Teamsters, Local 135, a/w International Brotherhood of Teamsters ("Charging Party" or "Union") against Interstate Brands Corporation (the Respondent).

The Regional Director's complaint, dated April 29, 2003, alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement with the Charging Party after reaching complete agreement on the terms of said agreement. The Respondent denies these complaint allegations. The issue presented is whether the bargaining unit's refusal to ratify the collective-bargaining agreement precludes the formation of a binding agreement so as to negate any duty the Respondent may have had to execute the contract.

At the trial, the parties were afforded a full opportunity to examine and to cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file post-trial briefs. The parties waived oral argument and, with the exception of the Charging Party, filed post-trial briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs of the Respondent and the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent maintains an office and place of business in Anderson, Indiana, where it is engaged in the manufacture and wholesale distribution of bread and cake items, and the operation of a bakery thrift store (store). The store is the only facility involved herein. During the year ending January 31, 2003, the Respondent purchased and received at its Anderson, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. It is admitted, and I find, that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

It is admitted, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. Unfair Labor Practice

The Union was certified as the exclusive bargaining representative of the store's employees on February 8, 2002. On April 17, 2002, the Union's business representative, Robin Greene (Greene), faxed the Union's initial proposal to the Respondent's human resources manager, Tonia Gordon (Gordon). This proposal consisted of the Master Bakery Agreement (MBA), which covered the thrift store employees at the Respondent's other central Indiana locations. Article 27 of the MBA "Duration of Agreement" set forth explicit dates upon which the agreement became effective and expired. In a follow-up telephone conversation, Gordon told Greene that the Respondent had not yet decided who would represent the Respondent in negotiations, that she would get back to him as to this, and that in the meantime he could send any proposals to her attention.

Eventually the Respondent and the Union held their first bargaining sessions on September 9 and 10, 2002, with Greene serving as the Union's chief negotiator and Dari Buckner (Buckner) serving in said capacity for the Respondent.[1] During these meetings, the parties agreed to work on an agreement limited to the Anderson thrift shop. The parties did not discuss ground rules for the negotiations. The Respondent presented the Union with two written contract proposals, both of which explicitly set forth effective and expiration dates, and dates for annual wage increases. Greene proposed that the contract should be effective upon ratification, and testified that under his proposal, "There would be no agreement prior to ratification."

[1] Buckner and Greene were the two principal witnesses. I rely mainly on Greene for the facts I have found herein, and credit Greene as to any differences in their testimony. Based on my observation of Buckner's demeanor, including her propensity to glance at the Respondent's counsel frequently before answering questions of counsel for the General Counsel, and the administrative law judge, and her repeatedly evasive and inconsistent answers to questions on cross-examination, and by the administrative law judge, I find her to be less than a reliable witness. Contrariwise, Greene answered questions forthrightly and, generally, without hesitation, even when it was obvious that the answers were not necessarily helpful to the Charging Party's legal argument.

The parties did not meet again until January 17, 2003, but exchanged mailed or faxed proposals in the interim. On September 26, 2002, the Union responded to the Respondent's proposals of September 9-10, with a written counterproposal, which included a provision that mandated Respondent contributions to a Union safety, training, and education trust fund, "*effective upon ratification*" (emphasis supplied). This proposal was the first mention of ratification in any of the written proposals. On December 3, 2002, the Respondent sent its counterproposal to the Union. Nothing in this counterproposal referred to ratification. The dates for yearly wage increases, contract effectiveness and expiration, and the date of the contract itself, were left blank.

At the January 17, 2003 meeting between the parties, Buckner presented a written offer to Greene in an attempt to resolve the entire contract. The cover page of the proposal sets forth the dates as "January 20, 2003 through January 20, 2007," but the duration provision adopted the Union's proposal as to ratification and provided, in pertinent part, "This agreement shall be in full force and effect upon ratification to and including January 20, 2007 . . . ." The proposal contained specific dates for yearly wage increases for each successive year of the contract, but the initial wage increase was to be effective "upon ratification." The Union requested that the contract be changed from 4 years to 3 years and that the Respondent increase its wage proposal by $.10 per hour per year. Later that day, the Respondent provided the Union with the requested changes, and a new written proposal that changed the dates on the cover sheet, but left the "upon ratification" language elsewhere in the agreement. Both Greene and Buckner then signed off on this proposal. Greene testified that his signature meant he was in agreement with the Respondent on all of the terms of the proposal and that he ". . . . was going back to the membership and let them decide on a vote." The bargaining unit voted to reject the contract on January 25, 2003.

Greene and Buckner met again on February 5, 2003. At this meeting the Respondent agreed to a change in the health insurance provision. On February 12, 2003, Greene convened a meeting attended by all five bargaining unit members. Greene informed them that the contract was basically the same as the one they rejected, but with improvements in health insurance, that they had to vote on the contract, and they would have two choices on the ballot: "Yes, I accept the company's final offer or no, I vote to strike." Following a caucus among themselves, the members refused to vote on the offer. Greene then informed the members that the Union had the right to accept the agreement, or reject the agreement and put the unit on strike.

The next morning Greene called Union President Barton for advice. Greene told Barton that he had been negotiating the contract for almost a year, that the unit had turned it down the first time and refused to vote the second time because they didn't like the agreement, but that they did not want to strike. Greene also told Barton ". . . they had made it known to me that they actually no longer wanted to be Teamster members." Barton responded, "You have been working on this for an entire year. They asked for certification and you have the right to accept this agreement. So, accept the agreement."

On February 13, 2003, Greene called Buckner and asked if the Respondent could improve the wage and insurance benefits. On February 14, Buckner called Greene and informed Greene that the Respondent would not improve its offer. Greene responded that he was, then, going to accept the contract. Buckner asked Greene if he had such authority. Greene responded that he did. Buckner responded that she thought the entire contract was contingent on the members ratifying the agreement, and that she would have to "check into that"

because she was not sure if he had the authority or not. Greene told Buckner that it was never the case that the contract was contingent on member ratification.[2]

On February 14, 2003, Greene wrote to the Respondent's regional manager, Jerry Williams, accepting the "…Company's final offer of settlement dated February 5, 2003 . . . ." In the letter Greene requested that Williams sign the agreement. Greene's letter further stated, "The effective date of this agreement is February 14, 2003 for a three (3) year duration." In a letter dated February 19, 2003, Buckner informed Greene, "In response to your letter dated February 14, 2003, since the contract was not ratified by the membership, there is no contract to accept. The Employer is withdrawing our final offer of settlement dated 02/05/03."

On February 21, 2003, a bargaining unit member filed a decertification petition with the National Labor Relations Board, seeking the decertification of the Union as representative of the Anderson thrift store unit. All of the showing of interest signatures were dated February 20, 2003. This petition was dismissed on April 30, 2003, based on the unfair labor practice alleged in the complaint herein.

On February 24, 2003, Greene mailed a letter to Regional Manager Williams with two copies of the contract prepared by the Union, and signed by Union Secretary-Treasurer Ron Hall. In the letter, Greene requested that Williams sign the contract and return one copy to Greene. These copies of the contract, essentially the Respondent's February 5 offer, contained certain changes the Union unilaterally made from the Respondent's last written proposal, with the pages retyped to reflect the changes. These changes are as follows: the Union filled in the dates on the cover page as "February 14, 2003 through February 15, 2006"; the Union filled in the dates of the second and third of the three yearly increases as "2/16/04 and 2/14/05" (the first year was left "upon ratification"); and the Union changed the expiration date from the date set forth in the Respondent's last proposal of January 21, 2006 to February 15, 2006. The Union had never previously discussed these changes with the Respondent.

Analysis and Conclusions

Both parties essentially set forth the issue as whether the parties had agreed to a ratification vote as a condition precedent to the formation of a contract, with the Respondent maintaining they had, and General Counsel arguing they had not. It is well settled that an employer's obligation to bargain collectively under the Act includes the execution of a written contract incorporating any agreement reached, if requested by the union. *N.L.R.B. v. Strong Roofing*, 393 U.S. 357 (1967), and *H.J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941).

Ratification only attains the status of being a condition precedent to the formation of a contract when the parties have reached an express agreement to such effect. *Observer-Dispatch,* 334 NLRB 1067 (2001). When the parties have reached such an express agreement as to ratification, the Board finds that a contract cannot become effective until ratification occurs. *Hertz Corp.*, 304 NLRB 469 (1991). Thus, under such circumstances, an employer is not obligated to execute a contract if the contract has not been ratified. See *Santa Rosa Hospital*, 272 NLRB 1004, 1006 (1984). But where ratification was merely a requirement self-imposed by the union, the Board has long held that an employer must sign the agreement upon request, regardless of whether or not ratification has taken place. *North Country Motors,* 146 NLRB 671 (1964). See also *C & W Lektra Bat Co.*, 209 NLRB 1038 (1974).

[2] This was contrary to his credited record testimony as to the significance of ratification in this contract.

Here, the Respondent contends, contrary to the General Counsel, that the parties bargained for, and agreed to, ratification as a condition precedent to the formation of a contract. The Respondent maintains, thus, that because the contract was never ratified it is under no obligation to execute the contract. Counsel for the General Counsel argues in his brief that, in fact, the parties never negotiated over whether or not the contract was subject to ratification, and that the Respondent slipped the ratification language into its January 17, 2003 offer, essentially unnoticed by the Union.

Relying on Greene's testimony, which I have credited, I conclude that the parties never actually discussed or negotiated over whether or not ratification was necessary to the formation of a collective-bargaining agreement. Nevertheless, it is clear from Business Representative Greene's uncontradicted and fully credited testimony that the parties had reached a mutual understanding as to the contractual ratification language, that ratification was a condition precedent to the formation of a contract. Greene's testimony included the following:

> Respondent's Counsel: "…I just want to make sure I am clear. Your own proposal, on September 10th, had nothing to do with acceptance of the contract; it had to do with the ratification of the contract. Is that not correct?"
> Greene: "It does say ratification."
> Respondent's Counsel: "And that was what the parties' agreement was is that prior to ratification, there would be no contract. That was the parties' agreement?"
> Greene: "Upon ratification. Prior to, there would be no contract."

At another point Greene testified as follows:

> Respondent's Counsel: "The last question, Judge, to Mr. Greene was prior to ratification, there was no agreement."
> Greene: "There would be no agreement prior to ratification."

And finally, at another point upon being asked by the undersigned as to why his signature and the signature of a representative of the Respondent appeared on the Respondent's final proposal to the Union, which the unit voted down, Greene testified as follows:

> Judge Rubin: "Okay and the fact is, on R-4, your signature appears on page 11.
> Greene: "Yes, it does."
> Judge Rubin: "Was it your expectation that the fact that you signed it and Mr. Williams . . . had also signed it that . . . in your mind, meant that there was a contract."
> Greene: "No."
> Judge Rubin: "That meant that this was subject to ratification in order to have a --."
> Greene: "Yes. The only thing that I was putting my signature on is that this document here include all of the changes that have been agreed upon by both parties."
> Judge Rubin: "Okay."
> Greene: "That I was going back to the membership and let them decide on a vote."

Counsel for the General Counsel, in his brief, maintains that the Respondent slipped the ratification language into its final proposal, hinting that somehow Greene didn't notice this addition. Counsel for the General Counsel further argues that "Greene's silence and decision not to comment on or object to the Respondent's language shall not be deemed an admission to the Respondent's requirement that the Union obtain such unit employee ratification." This argument, however, fails to acknowledge that the Respondent's use of the language in its proposal was preceded by Greene's verbal proposal for such language at the bargaining table, and that the first time any such language was utilized in either of the parties' written proposals was on September 26, 2002, as part of the Union's proposal as to the Respondent contributions to a union fund. The Respondent's representative Buckner and the Union's representative Greene both testified that they understood the contract language to mean that without ratification there was no contract. Counsel for the General Counsel, thus, would have me disregard the testimony of the two witnesses, labor relations professionals, and conclude that they both didn't understand what they were agreeing to. This I am not willing to do.

Accordingly, I conclude that while there was no explicit discussion at the bargaining table, both parties understood that the ratification language in the proposed contract mandated ratification prior to the formation of a contract. Inasmuch as the parties had agreed to this process, I further conclude that the Respondent was under no obligation to execute the agreement, absent ratification. See *Hertz Corp*., supra, and *Beatrice/Hunt Wesson*, 302 NLRB 224 (1991).

In the oft-cited *C & W Lektra Bat Co*., supra at 1039, the Board held that ratification was not a condition precedent in circumstances where "the Union was merely stating its intention, albeit forcefully, to take any contract reached to the membership for approval." The Board went on to say as to ratification, "Since this item was not offered as a proposal, there could be no acceptance by the Respondent in any event." Here, unlike *C & W Lektra Bat*, the disputed language appears in the contract, and was originally proposed by the Union.

In his brief, counsel for the General Counsel cites several cases in support of his argument that there was no condition precedent of ratification. But those cases are distinguishable. In *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989), where the Board found an employer's failure to execute the contract a violation of Section 8(a)(5), the parties never reached a written or verbal agreement as to ratification, unlike the instant case. Other cases cited by counsel for the General Counsel stand for the well-settled propositions that ratification and ratification procedures are nonmandatory subjects of bargaining, and that any such obligation self-imposed by a union does not equate to a condition precedent to the formation of a contract. These principles are inapplicable here because the ratification language, understood by both parties to mandate ratification prior to the formation of a contract, and initially proposed by the Union, was part of the written agreement. The only question here is: do the contractual words mean what they say? Both witnesses testified in the affirmative.

I note that the complaint pleads the parties had reached agreement on all terms to be incorporated into a collective-bargaining agreement, which pleading the answer denies. Neither side presented arguments as to this issue, except as to whether ratification had been agreed to as part of the contract. Significantly, the final offer, which the Union accepted, does not contain an effective date in the duration provision and contains no date for the first year wage increase other than "upon ratification."

It is well settled that mutual agreement as to the term of an agreement, including the effective commencement and termination dates, is an essential element of a binding collective-bargaining agreement. *Sheridan Manor Nursing Home*, 329 NLRB 476, 478 (1999). Clearly,

both sides had agreed to a 3-year duration, after earlier discussing a 4-year agreement. But because, as found herein, the parties had contemplated ratification as part of the process, and had turned their attention to the "meat and potatoes" of reaching an agreement, there was no discussion of an effective date of the agreement or wage increase, other than "upon ratification." Thus, even had I decided that ratification was not a condition precedent, I would still have concluded that the Respondent was not obligated to execute the agreement because the parties had not reached agreement as to the effective date of the agreement, or the wage increase, at least in the first year. I recognize that, under certain circumstances, it may be possible to infer that the parties reached agreement on an identifiable effective date. See *Sheridan*, supra at fn. 8. However, here, with the parties only contemplating effectiveness upon ratification, and not further discussing the issue, I see no basis to make such an inference. I further find that the legal analysis in *Cheese Barn, Inc., d/b/a Hickory Farms of Ohio*, 222 NLRB 418, enf. 558 F.2d 526 (9th Cir. 1977) is inapposite. In that case the administrative law judge concluded that the language of the duration provision "passed unnoticed and was not discussed by the parties." Here, the disputed language was initially proposed by the Union, and first appeared in writing in a union proposal.

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint that the Respondent has engaged in conduct violative of Section 8(a)(1) and (5) of the Act have not been supported by substantial evidence.

4. By failing and refusing to execute a collective-bargaining agreement with the Charging Party, the Respondent has not violated Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following[3]

ORDER

The complaint be dismissed in its entirety.

Dated, Washington, D.C.

_____
Mark D. Rubin
Administrative Law Judge

[3] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the Board shall as provided in Section 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.